

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

JUSTIN CORNELL,

Petitioner,

v.

Civil Action No. **3:21CV593**

DIRECTOR HAROLD CLARKE,

Respondent.

**MEMORANDUM ORDER
(Directing Respondent to Comply with Rule 5)**

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts states:

(c) Contents: Transcripts. The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) Contents: Briefs on Appeal and Opinions. The respondent must also file with the answer a copy of:

- (1)** any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;
- (2)** any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and
- (3)** the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

Rule 5, Rules Governing § 2254 Cases.¹

¹ If appropriate, Respondent may redact from the transcripts information it deems necessary to protect the privacy rights of minors or victims of Petitioner's crimes.

The Court acknowledges that both parties agree that the present action should be dismissed for lack of exhaustion of state court remedies. However, the United States Court of Appeals for the Fourth Circuit, recently stated that “lack of prejudice does not excuse the state’s failure to fulfil Rule 5’s mandatory compliance requirement.” *Sanford v. Clarke*, --- F.4th ----, No. 20-6712, 2022 WL 16643886, at *4 (4th Cir. Nov. 3, 2022). Additionally, the Fourth Circuit made clear that the delivery of physical state court records to the Court, but not uploaded to the Court’s electronic docket does not satisfy Respondent’s obligations under Rule 5. *See id.* at *2. Accordingly, within twenty (20) days of the date of entry hereof, Respondent shall file an Amended Answer that complies with Rule 5.

The Clerk is DIRECTED to send a copy of the Memorandum Order to Petitioner and counsel of record.

It is so ORDERED.

/s/ MRC
Mark R. Colombell
United States Magistrate Judge

Date: November 15, 2022
Richmond, Virginia